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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

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9 Jay Martin Jonas,

10 Plaintiff,

11 vs.

12 Dora Schriro, et al.,

13 Defendants.

) No. CV 04-2719-PHX-SMM (MEA)

) **ORDER**

14)

15)

16 Plaintiff Jay Martin Jonas, confined in the Arizona State Prison Complex-Eyman, filed

17 this *pro se* civil rights action regarding conditions in Special Management Unit II (“SMU

18 II”), the highest custody level in the Arizona Department of Corrections (“ADOC”). On

19 November 22, 2005, Plaintiff filed a Motion for Summary Judgment (Doc. #50). Defendants

20 filed a Cross-Motion for Summary Judgment on January 12, 2006 (Doc. #65).

21 The Court will deny Plaintiff’s Motion for Summary Judgment and will grant

22 Defendants Cross-Motion for Summary Judgment.

23 **I. Background**

24 Plaintiff filed his Complaint on November 30, 2004, alleging four grounds for relief:

25 (1) denial of substantive and procedural due process for indefinite confinement in SMU II

26 since November 18, 1998; (2) violation of the Eighth Amendment prohibition against cruel

27 and unusual punishment for conditions of indefinite confinement in SMU II; (3) denial of the

28 Eighth Amendment right to be free from retaliation and excessive force, given his

1 confinement in SMU II; and (4) violations of the First Amendment and the Religious Land
2 Use and Institutionalized Persons Act of 2000, because of Defendants' classification of the
3 "Warrior Society" as a Security Threat Group ("STG"), which has eliminated his ability to
4 practice his religion and traditions of his Native American beliefs.

5 On March 9, 2005, Defendants filed a Motion to Dismiss (Doc. #7). On July 7, 2005,
6 the Court granted the Motion to Dismiss as to Counts I and III of Plaintiff's Complaint (Doc.
7 #19). Accordingly, only Counts II and IV remain before the Court.

8 Plaintiff filed the pending Motion for Summary Judgment (Doc. #50) on November
9 22, 2005, and Defendants filed their Cross Motion for Summary Judgment (Doc. #65) on
10 January 12, 2006.

11 **II. Summary Judgment Standard**

12 A court must grant summary judgment if the pleadings and supporting documents,
13 viewed in the light most favorable to the non-moving party, "show that there is no genuine
14 issue as to any material fact and that the moving party is entitled to judgment as a matter of
15 law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).
16 When considering a summary judgment motion, the evidence of the non-movant is "to be
17 believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty
18 Lobby, Inc., 477 U.S. 242, 248 (1986). These inferences are limited, however, "to those
19 upon which a reasonable jury might return a verdict." Triton Energy Corp. v. Square D. Co.,
20 68 F.3d 1216, 1220 (9th Cir. 1995).

21 Rule 56(c) mandates the entry of summary judgment against a party who, after
22 adequate time for discovery, fails to make a showing sufficient to establish the existence of
23 an element essential to that party's case, and on which the party will bear the burden of proof
24 at trial. Celotex, 477 U.S. at 322-23. Rule 56(e) compels the nonmoving party to "set forth
25 specific facts showing that there is a genuine issue for trial" and not to "rest upon the mere
26 allegations or denials of [the party's] pleading." The nonmoving party must do more than
27 "simply show that there is some metaphysical doubt as to the material facts." Matsushita
28 Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). There is no issue

for trial unless there is sufficient evidence favoring the non-moving party. Anderson, 477 U.S. at 249. Summary judgment is warranted if the evidence is “merely colorable” or “not significantly probative.” Id. at 249-50.

III. Count II: Conditions of Confinement

In Count II, Plaintiff claims that the long-term isolation in SMU II violates the Eighth Amendment because: (1) he lacks adequate opportunity for outdoor recreation, exposure to direct sunlight and fresh air, and adequate clothing for exercise and warmth; (2) his cell is lit 24 hours a day; (3) he is served limited quantities of food; and (4) he is isolated from social and environmental stimulation. Defendants respond that the conditions satisfy the Eighth Amendment requirement of the “minimal civilized measure of life’s necessities.” Farmer v. Brennan, 511 U.S. 825, 834 (1994) (citing Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

Plaintiff further claims that as a result of the sedentary lifestyle and reduced calorie diet in SMU II, he suffers from back pain and has lost weight and that he suffers from paranoia and talks to himself as a result of the socially isolated conditions. Plaintiff has not sought treatment for his paranoia. Plaintiff has been told by the unit nurse that his back pain is normal and has been prescribed Tylenol for treatment. (Defs.’s Ex. 5, Pl.’s Dep’n at 41.)

The Court finds no issue of triable fact relating to the conditions of Plaintiff’s confinement, and finds Defendants are entitled to summary judgment on this claim.

A. Recreation

Inmates in SMU II now receive six hours per week of outdoor recreation¹ for two-hour periods three days per week. (Pl.’s Opp’n to Cross-Mot. for Summ. J. (“Pl.’s Opp’n”) at 5; Def.’s Statement of Facts (“DSOF”) at ¶42.) The recreation area at SMU II is a rectangular area measuring approximately 20 feet by 10 feet. (Pl.’s Dep. at 27.) The area is made up of cement wall and floors and has a steel mesh roof, which allows in outside air, and at certain times of the day, sunlight. (DSOF at ¶43; Pl.’s Dep. at 27.) There is no exercise equipment

¹At the time Plaintiff filed the Complaint, SMU II inmates received three hours per week of outdoor recreation. (DSOF at ¶41.)

1 in the recreation area, although SMU II inmates may request the use of a handball during
 2 their recreation time. (DSOF at ¶43.) Inmates are permitted to exercise in their cells.
 3 (DSOF at ¶41.) To keep warm and for exercise, Plaintiff may buy a jumpsuit or sweats from
 4 the inmate store. (DSOF at ¶37.)

5 Plaintiff states that he mainly walks during his recreation time. There is no evidence
 6 to show that he has been prevented from using the recreation yard and Plaintiff states he
 7 almost always uses his recreation time. (Pl.'s Dep. at 29.) While the "deprivation of outdoor
 8 exercise could constitute cruel and unusual punishment," Allen v. Sakai, 48 F.3d 1082, 1087
 9 (9th Cir. 1994), there is no allegation in this case that Plaintiff is denied outdoor recreation.
 10 Further, Plaintiff offers no support for his argument that the outdoor recreation area in SMU
 11 II is constitutionally inadequate; Plaintiff acknowledges he receives outdoor air and sunlight
 12 at times, and that recreation is sufficiently large enough for him to walk around. (Pl's Dep.
 13 at 27.) Finally, Plaintiff makes no argument in his summary judgment motion, nor does he
 14 offer any evidence, that he is not provided with sufficient clothing for exercise.

15 **B. Lighting**

16 SMU II is a maximum security facility. Within SMU II, cell lights are on at all times.
 17 (Pl.'s Statement of Facts ("PSOF") at ¶11, DSOF at ¶19.) However, lights are dimmed
 18 between the hours of 10:00 p.m. and 4:00 a.m. Sunday through Thursday, and between 12:00
 19 a.m. and 4:00 a.m. Friday through Saturday. (DSOF at ¶19.) Defendants offer evidence
 20 demonstrating that during the day, with the cell door open, and the daylight on and the
 21 nightlight off, the average light level in a cell near the sink was 72 footcandles ("FC").²
 22 (DSOF at ¶ 22.) At night, with the cell door open, the daylight off and the nightlight on, the
 23 average light level in a cell near the sink was 1 FC. (*Id.*) Plaintiff states that dimmed lights
 24 are bright enough for him to read a book or write letters. (Pl's Opp'n at 5.) Plaintiff further
 25 states that he cannot sleep unless his eyes are covered. (*Id.*)

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 28 ²A footcandle is a unit of illuminance measurement. One FC represents the amount of light
 one candle produces per square foot. (See Defs.'s Ex. 4, Decl. of Gerald Katafiasz, Electrical
 Engineer, LSW Engineers Arizona, Inc., at ¶5.)

1 Defendants argue that the lighting in SMU II does not violate the Eighth Amendment.
2 For security reasons, during sleeping hours, the lights in Plaintiff's cell are not turned off but
3 are significantly dimmed. The lower light level is less disruptive than officers using bright
4 flashlight to make inmate checks. (DSOF ¶29.) Plaintiff states that he is able to sleep with
5 a cloth over his eyes and has also admitted that he has not sought treatment for the headaches
6 he alleges result from the lighting in SMU II. (Pl.'s Dep. at 43.) There is no evidence,
7 beyond Plaintiff's mere allegations, to show that the constant illumination, which included
8 dimmed lights during sleeping hours, deprived Plaintiff of his health. Moreover, this Court
9 has previously found in a separate case that the lighting conditions in SMU II, which were
10 identical to those at issue in this case, do not violate the Eighth Amendment. See Baptisto
11 v. Ryan, 2006 WL 798879, 28 (D. Ariz. 2006) (the minimal amount of light at night in SMU
12 II, which is similar to that given off by a nightlight, is insufficient to satisfy the objective
13 prong of the Eighth Amendment analysis).

14 **C. Food**

15 SMU II inmates are given a reduced calorie diet based on a less active life-style.
16 (DSOF at ¶46; Pl.'s Opp'n at 5.) This diet was developed by a dietician and provides SMU
17 II inmates with three meals per day during the week and two meals per day during the
18 weekends. (DSOF at ¶46 & McWilliams Decl. at ¶25.) Plaintiff alleges that he has lost
19 weight while confined in SMU II, however Plaintiff also states that he gained weight during
20 the holiday season while confined in SMU II. (Pl.'s Dep. at 31.) Inmates in SMU II are not
21 permitted to purchase food items from commissary, with the exception of certain items
22 during December. (DSOF at ¶47.)

23 Plaintiff does not allege that he has been denied any meals as described above.
24 Although Plaintiff alleges that his overall weight has decreased from 200 to 163 pounds in
25 the four years that he has been held in SMU II (Plaintiff is five feet ten inches tall), there is
26 no evidence, beyond Plaintiff's allegations, to show that Plaintiff's health suffers from lack
27 of nutrition. Plaintiff's weight loss was gradual (less than ten pounds per year) and his
28 current weight appears to be within the healthy range for an adult male of his height.

Moreover, Plaintiff has himself stated that he has gained weight on occasion while confined in SMU II.

D. Social Contact

SMU II inmates are allowed one non-contact visit per week for a maximum of two hours, with up to four visitors at one time (DSOF at ¶38), and one five-minute phone call per week (*Id.* at ¶39). Inmates also have contact with staff and are permitted to see prison and religious counselors. Plaintiff may have a radio and a television. (DSOF ¶35.)

Plaintiff and other inmates in SMU II are not allowed to work or participate in vocational or education programs, although they may pursue individual programs within their cells. (DSOF at ¶51.) Plaintiff presents no evidence to contradict facts and Plaintiff has not shown that this social interaction is constitutionally inadequate.

IV. Count IV: Religious Exercise

In Count IV of the Complaint, Plaintiff alleges that Defendants have violated the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. §2000cc-1, by prohibiting him from engaging in pipe ceremonies, smudging, wearing of colored headbands, and using a sweat lodge. Plaintiff also alleges that Defendants have violated RLUIPA by refusing to hire a Native American spiritual adviser.

Under RLUIPA, “[n]o [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,” unless the government shows that the burden furthers “a compelling governmental interest” and does so by the “least restrictive means.” 42 U.S.C. § 2000cc-1(a)(1)-(2).

Courts have widely recognized that maintaining institutional security is a compelling government interest. *See Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (“It bears repetition . . . that prison security is a compelling state interest, and that deference is due to institutional officials’ expertise in this area”); *Warsolider v. Woodford*, 418 F.3d 989, 998 (9th Cir. 2005) (prison security is clearly a compelling governmental interest); *Harris v. Chapman* 97 F.3d 499, 503-04 (11th Cir. 1996) (states’ “compelling interest in security and order within their prisons” especially applies in close custody facilities).

1 **A. Spiritual Adviser**

2 Plaintiff's first contention that the ADOC is required by RLUIPA to hire a Native
 3 American spiritual adviser to assist Native American inmates in observance of their religious
 4 practices is meritless. Not "every religious sect or group within a prison—however few in
 5 number—must have identical facilities or personnel. . . nor must a chaplain, priest, or minister
 6 be provided without regard to the extent of the demand." Allen v. Toombs, 827 F.2d 563,
 7 568 (9th Cir. 1987). The Court notes that Defendants' evidence makes clear that Plaintiff
 8 may have access to a spiritual adviser, but that Plaintiff is responsible for co-ordinating such
 9 a visit. (Def's Ex. 7, Linderman Decl.³ at 19.) Plaintiff has not alleged that he has been
 10 denied access to a spiritual adviser, only that one has not been provided for him. Plaintiff
 11 has not demonstrated that his ability to practice his religion is substantially burdened by the
 12 requirement that he bear the responsibility for co-ordinating his visits with a spiritual adviser,
 13 and the Court finds no RLUIPA violation in the ADOC's policy.

14 **B. Smudging and Pipe Ceremonies**

15 With respect to smudging and pipe ceremonies, the facts offered by both Plaintiff and
 16 Defendants suggest that while Plaintiff's ability to practice these ceremonies is limited, he
 17 is not prohibited from engaging in them. Plaintiff is allowed to perform smudging during his
 18 recreational time. (DSOF at ¶83; Pl.'s Dep. at 59.) Plaintiff may purchase the herbs required
 19 for smudging through an ADOC approved vendor or use donated smudging materials, and
 20 is required to provide ADOC staff with notice of when he intends to perform smudging.
 21 (DSOF at 89; Pl.'s Dep. at 59-60.) Indigent Native American inmates in SMU II, who have
 22 registered their ethnicity with the ADOC, may use donated smudging materials. (Linderman
 23 Decl. at ¶16.)

24 Plaintiff has not demonstrated how being required to purchase herbs through an
 25 ADOC approved vendor violates his free exercise rights when ADOC has a compelling
 26 security interest in controlling and monitoring the flow of materials in and out of the prison.
 27 With respect to donated herbs, Plaintiff offers no evidence that he is indigent and has

28 ³Michael Linderman is the Administrator of Pastoral Services for the ADOC.

1 requested the herbs, or that he was refused herbs for smudging ceremonies.

2 Plaintiff may also conduct a personal pipe ceremony during recreation time. (DSOF
3 at ¶92.) Plaintiff may arrange for a Native American spiritual adviser to conduct the
4 ceremony (DSOF at ¶90.) ADOC has been advised that an inmate may conduct a personal
5 pipe ceremony without a spiritual adviser, although Plaintiff appears to disagree with this
6 statement. (DSOF at ¶90; Pl.'s Dep. at 65.)

7 Defendants present evidence that a pipe for use in a pipe ceremony is available in
8 Plaintiff's unit. (Linderman Decl. at ¶ 21.) Plaintiff does not dispute this statement and he
9 does not claim in his motion or statement of facts that he has been denied access to the pipe.

10 Even assuming, for purposes of this Order, that Defendants' limits on smudging and
11 pipe ceremony practices constitutes a substantial burden on Plaintiff's ability to exercise his
12 religion, Defendants demonstrate that only allowing inmates to conduct the smudging and
13 pipe ceremonies—both of which are smoke generating—outside during recreation time is the
14 least restrictive means of maintaining institutional security. Plaintiff makes no credible
15 argument that less restrictive practices are available that would still account for ADOC's
16 security interests; Plaintiff appears to suggest only that he be allowed to perform these
17 ceremonies at his own discretion without having to inform prison staff in advance.

18 The Court finds no RLUIPA violation in the smudging or pipe ceremony policies.

19 **C. Headbands**

20 Plaintiff is permitted to wear colored headbands when in the enclosed recreational
21 area and during times when he is specifically involved in religious practices, but is not
22 permitted to wear the headbands at other times. (DSOF at ¶ 88.) The ADOC restricts the use
23 of headbands to prevent violence associated with open gang affiliation. (*Id.*) Defendants
24 argue that the exception for religious practice is the least restrictive means of maintaining
25 security. Plaintiff essentially argues that he should be allowed to wear headbands at all
26 times. (Pl.'s Dep. at 71.) Again assuming that Defendants' restrictions on headbands
27 constitutes a substantial burden on Plaintiff's religious practice, Defendants have
28 demonstrated a compelling interest in maintaining security and discouraging open gang

1 affiliation and have demonstrated that the exception to the headband policy for religious
2 practices is the least restrictive means of maintaining security by preventing overt gang
3 identification. Accordingly, the Court finds no RLUIPA violation in ADOC's headband
4 policy.

5 **D. Sweat Lodge**

6 There is no sweat lodge in SMU II. (DSOF at ¶93; PSOF at 24.) The ADOC has not
7 constructed sweat lodges in SMU II because there is no area which can accommodate a sweat
8 lodge (DSOF at ¶93), and because SMU II inmates may never be out of view of security
9 (DSOF at ¶94). An inmate using a sweat lodge is necessarily out of sight of prison staff.
10 Because SMU II inmates must remain within sight of ADOC staff at all times, there appears
11 to be no less restrictive means of maintaining security while allowing inmates to participate
12 in sweat lodge ceremonies. The Court finds no RLUIPA violation in ADOC's policy
13 regarding sweat lodges in SMU II.

14 **E. First Amendment**

15 Plaintiff also argues that Defendants' policies violate his First Amendment free
16 exercise rights. "When a prison regulation impinges on inmates' constitutional rights, the
17 regulation is valid if it is reasonably related to legitimate penological interests." O'Lone v.
18 Estate of Shabazz, 482 U.S. 342 (1987); Turner v. Safely, 482 U.S. 78 (1987). Because the
19 Court has found that the restrictions at issue protect the state's compelling interest in
20 maintaining prison security, these restrictions are necessarily reasonably related to legitimate
21 penological interests.

22 Defendants are therefore entitled to summary judgment under both RLUIPA and First
23 Amendment analyses on Plaintiff's religious claims.

24 **V. Conclusion**

25 The Court finds no genuine issue of triable fact. An analysis of the issues and relevant
26 law shows Defendants are entitled to summary judgment. The Court will grant Defendants'
27 Cross-Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment.

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4 **IT IS ORDERED:**

5 (1) Plaintiff's November 22, 2005 Motion for Summary Judgment (Doc. #50) is
6 **DENIED.**

7 (2) Defendants' January 12, 2006 Cross Motion for Summary Judgment (Doc. #65)
8 is **GRANTED.**

9 (3) The Clerk of Court must close this case and enter judgment accordingly.

10 DATED this 25th day of September, 2006.

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Stephen M. McNamee
United States District Judge